

establishment. *Id.* The Plaintiff claims that the Defendant was negligent in providing adequate security for its patrons. *Id.* The Plaintiff alleges that the Defendant's negligent actions caused the Plaintiff to be attacked and suffer severe physical and mental injuries. *Id.* On May 26, 2011, the Defendant filed its Answer to the Plaintiff's Second Amended Complaint denying the Plaintiff's alleged claims. [See attached as Exhibit 4, Defendant's Answer to Plaintiff's Second Amended Complaint.] On April 27, 2017, the Court set the dispositive motion deadline for January 31, 2018. [See attached as Exhibit 5, Case Management Order, dated April 27, 2017.]

B. Factual Background of December 10, 2006 Incident

1. Plaintiff's and Stephen McPherson's Account of the Incident.

On December 9, 2006, the Plaintiff went to a gentlemen's club, the Sky Box, in Harvey, Illinois with his friend, Stephen McPherson ("McPherson"). [See attached as Exhibit 6, Plaintiff's Deposition Transcript, p. 31, ln 11-20, p. 32, ln 17-18.] The two men left Sky Box between 10:15-10:30 p.m. and arrived at Cavanaugh's at 11:00 p.m. [Exhibit 6, p. 32, ln 1-8.] At Cavanaugh's, the Plaintiff did not have any confrontations or alterations while inside the bar. [Exhibit 6, p. 50, ln 22-24.] After socializing with two of the bartenders, the Plaintiff and McPherson left Cavanaugh's at its closing time at 3:00 a.m. on December 10, 2006. [Exhibit 6, p. 51, ln 22-25.]

As the Plaintiff and McPherson were leaving Cavanaugh's, they did not have any issues with any of the patrons inside the bar. [Exhibit 6, p. 52, ln 16-25.] The Plaintiff and McPherson exited through the left side of the building. [See attached as Exhibit 7, McPherson's Deposition Transcript, p. 29, ln 12-17.] There were security guards at the door as the Plaintiff and McPherson left the bar. [Exhibit 7, p. 29, ln 21-22.] After the Plaintiff and McPherson left the bar, they headed toward the Plaintiff's vehicle. [Exhibit 7, ln 30, ln 3-5.]

In McPherson's deposition, photographs of Cavanaugh's layout were shown to

McPherson. [See attached as Exhibit 8, Photographs of Cavanaugh's.¹] In the deposition, a diagram of Cavanaugh's layout and the adjacent library were shown to McPherson.² [See attached as Exhibit 9, McPherson's Diagram.] McPherson indicated on the diagram that as he and Porterfield were walking through the middle of Cavanaugh's parking lot, words were exchanged with Andrea Acevedo ("Andrea"). [Exhibit 9, p. 33, ln 21-25; Exhibit 10, see the "X" with the letter "S" above it.]

McPherson indicated that he and Porterfield kept walking and words were exchanged with the other parties in the area closer to the adjacent library. [Exhibit 7, p. 35, ln 13-21; Exhibit 9, see the "X" with the letter "C" above it.] McPherson was then punched and landed into the bushes in front of the library. [Exhibit 7, p. 38, ln 9-25; Exhibit 9, see the "X" in the area of the library with the letter "S" above it.] After the fight, McPherson called 911 and saw people taking the Plaintiff back inside Cavanaugh's. [Exhibit 7, p. 47, ln 12-21.] The police and ambulance showed up five minutes later and drove the Plaintiff to the hospital. [Exhibit 7, p. 48, ln 3-22.]

The Plaintiff indicated that words were exchanged between the parties three quarters of the way through Cavanaugh's parking lot and the fight spilled over into the adjacent library. [Exhibit 6, p. 60, ln 19-25, p. 61, ln 1-5.] The Plaintiff had no reason to believe that he was going to be involved in a fight until it actually occurred. [Exhibit 7, p. 93, ln 14-17.] The Plaintiff was also surprised he was even hit and felt that the incident was unexpected. [Exhibit 6, p. 93, ln 18-20.] McPherson testified that him being punched was an unexpected event. [Exhibit 7, p. 60, ln 11-15.]

2. Andrea Acevedo's Account of the Incident.

Andrea was leaving out of Cavanaugh's when McPherson came up to her and touched her

¹ The photos give a visual of Cavanaugh's layout and the adjacent library.

² The diagram was used in the parties' deposition in order to give a visual of where each party was situated during the December 10, 2006 incident.

arm. [See attached as Exhibit 10, Andrea's Deposition Transcript, p. 22, ln 15-25.] Andrea stopped walking, turned around and faced him. [Exhibit 10, p. 23, ln 21-23.] McPherson then said "fuck you, bitch." [Exhibit 10, pp. 8-9, ln 20-25, 1.] Andrea told McPherson that "it's late" and that "we do not need any problems right now." [Exhibit 10, p. 10, ln 3-4.] McPherson then apologized. [Exhibit 11, p. 10, ln 5-6.]

After McPherson apologized, the Plaintiff interjected and stated "what are you apologizing to this bitch for?" [Exhibit 11, p. 10, ln 8-12.] The Plaintiff then approached the four men that accompanied Andrea and stated "what are you bitches gonna do about it?" [Exhibit 10, p. 13, ln 21-25.] The Plaintiff proceeded to punch Jesus Venegas ("Venegas"), who was one of the men that accompanied Andrea. [Exhibit 10, p. 14, ln 4-7.] The Plaintiff threw the first punch. [Exhibit 10, p. 15, ln 7-11.]

In Andrea's deposition, the same diagram from McPherson's deposition was shown to Andrea. [See attached as Exhibit 11, Andrea's Diagram.] Andrea indicated on the diagram that she saw security guards located outside the bar. [Exhibit 10, p. 56, ln 6-13; Exhibit 11, see the letter "S" on both sides of Cavanaugh's entrance.] Andrea indicated on the diagram that she was in front of the adjacent library's entrance when McPherson started speaking to her. [Exhibit 10, p. 57, ln 9-13; Exhibit 11, see the "A" with the circle around it.] Andrea indicated on the diagram that the Plaintiff was behind McPherson while the statements were being made. [Exhibit 10, p. 63, ln 17-22; Exhibit 11, see the letter "P" with the circle around it.] Andrea believed the fight was unexpected as she and her friends did not have any altercations with the Plaintiff while inside the bar. [Exhibit 11, p. 16, 7-20.]

3. Jason Dorado's Account of the Incident.

Jason Dorado ("Dorado"), testified he was walking close to the adjacent library with

Andrea, Anthony Acevedo (“Anthony”) and Venegas when McPherson started talking to Andrea. [See attached as Exhibit 12, Dorado’s Deposition Transcript, p. 9, ln 17-24.] After the words were exchanged, Dorado also recalled the Plaintiff throwing the first punch and hitting Venegas. [Exhibit 12, p. 16, ln 12-15.] Dorado indicated that the fight took place at the adjacent library. [Exhibit 12, p. 18, ln 18-21.]

4. Jesus Venegas’ Account of the Incident.

As Venegas approached Andrea and Dorado, the Plaintiff struck Venegas in the face. [See attached as Exhibit 13, Venegas’ Deposition Transcript, p. 19, ln 3-8.] Venegas testified that he did not exchange any words with the Plaintiff before the Plaintiff struck him in the face. [Exhibit 13, p. 19, ln 5-10.] In Venegas’ deposition, the same diagram used for the other parties was shown to him. [See attached as Exhibit 14, Venegas’ Diagram.] The Plaintiff punched Venegas in the grassy area in front of the adjacent library. [Exhibit 13, p. 18, ln 23-25; Exhibit 14, see the “X” and the word “punched” in the grassy strip area.] After Venegas was punched, Anthony ran over to assist him. [Exhibit 13, p. 27, ln 25; p. 28, ln 1-2] Venegas recalled being punched unexpectedly. [Exhibit 13, p. 20, ln 5-6, p. 26, ln 11-13.]

5. Anthony Acevedo’s Account of the Incident.

The diagram was used in Anthony’s deposition as well. [See attached as Exhibit 15, Anthony’s Diagram.] Anthony indicated on the diagram that he was speaking to a woman before the incident occurred. [See attached as Exhibit 16, Anthony’s Deposition Transcript, p. 18, ln 25, p. 19, ln 1-5; Exhibit 16, see the letter “A” next to the X closer to Cavanaugh’s entrance.] Anthony saw the Plaintiff punch Venegas, so he ran over to the area where Andrea and Venegas were situated. [Exhibit 16, p. 20, ln 5-11; Exhibit 15, see the letters “A” and “J” in the adjacent library.] Anthony recalled Cavanaugh’s security staff running over to the area of the incident as well.

[Exhibit 16, p. 24, ln 8-12.] Anthony testified that as he was trying to assist Venegas, Cavanaugh's security staff responded to the scene and inform the parties that they would have to remain in the adjacent library since the police was on their way. [Exhibit 16, p. 23, ln 2-6.]

C. Cavanaugh's Security Practices and Standards

Nick Korounos ("Korounos") was one of the owners of Cavanaugh's. [See attached as Exhibit 17, Korounos' Deposition Transcript, p. 5, ln 10-13.] On December 10, 2006, Cavanaugh's had two security guards at the door checking patrons' identification as they entered the bar. [Exhibit 17, p. 59, ln 10-12.] Cavanaugh's had five other security guards walk throughout the bar and provide security. [Exhibit 17, at p. 59, ln 17-20.] Cavanaugh's closed at 3:00 a.m. and would allow the patrons to filter out of the bar until 3:15 a.m. [Exhibit 17, p. 65, ln 13-19.] Security guards would stand at the exit door as the patron exited Cavanaugh's. [Exhibit 17, p. 66, ln 15-17.] The security guards at the door would monitor Cavanaugh's parking lot as the patrons funneled out of the bar. [Exhibit 17, p. 70, ln 4-5.]

The security standards and practices employed by Cavanaugh's were consistent with the standards and practices executed at other sports bars and night club establishment throughout the State of Indiana. [See attached as Exhibit 18, James H. Clark's Affidavit, ¶11.] Cavanaugh's maintained a security presence by having security officers posted at the entrance, throughout and at the exit of the establishment. *Id.* The security officers' presence also included the area outside the bar where the security would observe Cavanaugh's parking lot as the patrons exited the building and prevent them from lingering on the premises. *Id.* When Cavanaugh's security staff became aware of the incident, the security officers broke up the fight, attended to the injured parties and detained the combatants. *Id.* at ¶20.

The December 10, 2006 incident involving the Plaintiff was an instantaneous and

unforeseeable event as the actions occurred after the parties left Cavanaugh's. *Id.* at ¶12. The incident was not precipitated by any prior actions of the parties while inside Cavanaugh's. *Id.* at ¶13. The incident started away from the entrance of Cavanaugh's and ended in the area in front of the library that is adjacent from Cavanaugh's. *Id.* It was virtually impossible for Cavanaugh's security officers to prevent a patron, whether drunk or sober, from striking another patron in a spontaneous matter. *Id.* at ¶17. Cavanaugh's cannot be responsible for the unforeseeable criminal acts involving the Plaintiff and other parties. *Id.* at ¶19. The circumstances that occurred in the matter were not reasonably foreseeable to Cavanaugh's security staff. *Id.* at ¶20.

D. Facts Surrounding the Investigation of the Incident

On June 26, 2007, the Plaintiff refused to give the Schererville Police Department a statement regarding the incident at Cavanaugh's. [Exhibit 6, p. 83, ln 2-5.] The Plaintiff also refused to pursue criminal charges against the individuals that were involved in the incident. [Exhibit 5, p. 84, ln 1-11.] Subsequently, the Plaintiff signed a waiver relinquishing his ability to pursue criminal charges. [Exhibit 6, p. 86, ln 8-10.]

The investigating officer at the time, now Corporal Michael A. Vode ("Vode"), testified that he advised the Plaintiff how critical his statement was to the overall investigation. [See attached as Exhibit 19, Vode's Deposition Transcript, p. 49, ln 9-14.] The Plaintiff did not want to give a statement and waived any further investigation. [Exhibit 19, p. 49, ln 2-8.] The criminal investigation was subsequently terminated. [Exhibit 19, p. 51, ln 8-12.]

For the reasons set below, there are no genuine issues of material facts, so the Defendant is entitled to judgment as a matter of law.

II. LEGAL ARGUMENT

A. Legal Standard

The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012). Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Reed*, 980 N.E.2d at 285.

Any doubts as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party. *Id.* Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 39 (Ind. 2002).

B. Cavanaugh's Does Not Owe a Duty to the Plaintiff Because the December 10, 2006 Incident With Porterfield Involved a Criminal Attack From a Third Party That Was Unforeseeable.

To prevail on a claim of negligence the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty. *King v. Ne. Sec. Inc.*, 790 N.E.2d 474, 484 (Ind. 2003). Absent a duty there can be no negligence or liability based upon the breach. *Peters v. Forster*, 804 N.E.2d 736, 738 (Ind. 2004). Whether a duty exists is a question of law for the court to decide. *Peters*, 804 N.E.2d at 738.

In the Fall of 2016, the Indiana Supreme Court decided the case *Goodwin v. Yeakle's Sports Bar and Grill, Inc.* 62 N.E.3d 384 (Ind. 2016). In *Goodwin*, the Indiana Supreme Court essentially redrew Indiana bar owners' premises liability by holding that for purposes of determining whether an act is foreseeable in the context of duty, the court assesses whether there is some likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it. *Goodwin*,

62 N.E.3d at 384. The Indiana Supreme Court went on to indicate that because almost any outcome is possible and can be foreseen, the mere fact that a particular outcome is sufficiently likely is not enough to give rise to a duty. *Id.* at 391.

Specifically, the Indiana Supreme Court, with adopting the rationale in *Goldsberry v. Grubbs*, 672 N.E.2d 475 (Ind. Ct. App. 1996), found that the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence. *Goldsberry*, 672 N.E.2d at 479.

In *Goodwin*, three bar patrons were sitting at a table in Yeakle's Sports Bar and Grill. *Goodwin*, 62 N.E.3d at 385. Another patron sat nearby with his wife. *Id.* Apparently, the patron that was sitting with his wife thought he heard one of the three patrons, who were sitting at the table nearby, make a derogatory remark about his wife. *Id.* Angered, the patron produced his handgun and fired towards the patron who purportedly made the comment. *Id.* The bullet struck not only that particular patron, but the two other patrons as well. *Id.* The three patrons filed suit against the bar alleging that it was negligent by failing to provide security for its patrons. *Id.* at 386.

In assessing duty, the court found that the broad type of plaintiff in the matter was a patron of a bar and the harm was the probability or likelihood of a shooting inside the bar. *Id.* at 393. The court reasoned that even though sports bars set the stage for rowdy behavior, it cannot be said that the bar owners would contemplate that a bar patron would suddenly shoot another patron. *Id.* The court found that all crimes are essentially foreseeable, so the imposition of liability on bar owners to implement protection to their patrons would make bar owners insurers of their patrons' safety,

which is contrary to Indiana's public policy. *Id.* at 394. Ultimately, the court held that a shooting inside a neighborhood bar is not foreseeable as a matter of law. *Id.* As a result, the court affirmed the trial court's grant of the bar's summary judgment motion. *Id.*

In *Powell v. Stuber*, No. 71A03-1705-CT-967, 2017 WL 6347835 at *1. (Ind. Ct. App. Dec. 13, 2017), another recent bar premises liability matter, the court, in echoing the *Goodwin* opinion, held that the robbery and attack sustained by the plaintiff was not foreseeable. *Powell*, No. 71A03-1705-CT-967, 2017 WL 6347835 at *1. In *Powell*, the plaintiff left the bar and walked through the parking lot to his vehicle. *Id.* Someone called out to the plaintiff, so he turned around to see who was calling out to him. *Id.* After the plaintiff turned around, he was struck from behind and robbed of his car keys and wallet. *Id.* The assailants ran away, so the plaintiff went inside his vehicle and called his girlfriend. *Id.*

Shortly thereafter, the assailants returned, opened the plaintiff's car door and attacked him a second time. *Id.* The assailants ran to another vehicle, so the plaintiff proceeded after them on foot. *Id.* The driver of the vehicle put the car in reverse, causing the car's mirror to strike the plaintiff. *Id.* Subsequently, the plaintiff filed a negligence claim against the bar. *Id.* The court found that whether the particular plaintiff's injury was reasonably foreseeable in light of the particular defendant's conduct is explicitly not relevant in determining duty. *Id.* at *3.

In analyzing duty, the court reasoned that the broad type of plaintiff in the matter was a patron of the bar and the broad type of harm was the likelihood of a criminal attack being extended when the victim confronts his assailants, thus placing himself at a risk for further injury. *Id.* at *4. The court held that it was not foreseeable that the bar owners would contemplate a criminal attack in their parking lot. *Id.* The bar owners also could not anticipate that the attack would be extended when the victim chased the assailants. *Id.* The court ultimately affirmed the trial court's grant of

the bar's motion for summary judgment. *Id.*

Here, Cavanaugh's does not owe a duty to the Plaintiff because the initial exchange which led to a fight was unforeseeable. With taking into account the broad plaintiff in this matter, like the *Goodwin* and *Powell* cases, Porterfield is a patron of a bar. The broad type of harm here is a probability or likelihood of an unexpected argument in a sports bar's parking lot that leads to a fight in the adjacent area. It could hardly be argued that Cavanaugh's could anticipate an argument in its parking lot that results in a fight in the adjacent library.

The evidence shows that the parties involved did not even expect the fight and felt that the entire incident was unexpected. The Plaintiff did not expect to be involved in a fight and was surprised that he was hit. McPherson did not expect to get punched as he was leaving the bar and walking towards his car. Andrea felt that the entire incident was unexpected since her friends and she did not have any arguments or issues with the Plaintiff or McPherson while inside Cavanaugh's. The Plaintiff and McPherson had no communications or contact with Andrea and her friends while inside the bar. Instead, the Plaintiff and McPherson spent most of their time socializing with the bartenders. It could hardly be argued that Cavanaugh's could expect the exchange which ultimately lead to a fight when the incident happened spontaneously.

Cavanaugh's was not placed on notice of any issues since the parties had no communications or contact while inside the bar or while exiting the bar. The record shows that the argument between the parties started three quarters of the way through Cavanaugh's parking lot after Cavanaugh's had already closed. The exchange ultimately led to the fight which took place in the adjacent library. To place liability on Cavanaugh's for this unforeseen event would make the bar an insurer of the Plaintiff which is against this state's public policy as stated in *Goodwin*. Therefore, the incident was unexpected, and as a result, the Defendant did not have a

duty to protect the Plaintiff from a criminal attack of third party.

Therefore, the Court should grant the Defendant's Motion for Summary Judgment.

C. The Plaintiff's Claims Must Fail Because Cavanaugh's Security Practices Could Not Prevent the December 10, 2006 Incident Because It Was Unforeseeable.

Because almost any outcome is possible and can be foreseen, the mere fact that a particular outcome is sufficient likely is not enough to give rise to a duty. *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 392 (Ind. 2016.) Although bars can often set the stage for rowdy behavior, bar owners do not expect that one bar patron will [commit a criminal act on] another. *Goodwin*, 62 N.E.3d at 394.

In *Goodwin*, there was no mention of security. Unlike *Goodwin*, Cavanaugh's had security staff in its bar. Cavanaugh's undertook security practices in order to maintain a safe environment. First, Cavanaugh's maintained a security presence by employing more than five security guards to provide security services in numerous areas of the bar. There were two security guards at the entrance and exit doors of Cavanaugh's. There were also five security guards who walked throughout the inside of the bar and observed patron behavior. The security staff would also monitor Cavanaugh's parking lot and prevent patrons from remaining on the premises after the establishment closed.

Second, Cavanaugh's security staff response to the incident was sensible. After the security was notified of the incident, the security guards immediately went over to the area to break up the fight, attended to the injured parties and detained the assailants before the police officers arrived. Third, the incident was entirely unexpected, so Cavanaugh's security practices could not prevent the spontaneous exchange between the parties which ultimately led to a fight. There were no prior altercations between the parties while they were inside the bar to place the security staff

on alert.

The incident was unexpected as the event occurred after Cavanaugh's closed. The parties exchange words three quarters of the way through Cavanaugh's parking lot and ended fighting in the area in the adjacent library. The involved parties did not even expect to engage in a physical altercation, so it was virtually impossible for Cavanaugh's security staff to prevent the patrons from striking one another when the event occurred in such a spontaneous manner.

As such, Cavanaugh's cannot be held responsible for the unforeseeable criminal acts of the parties. Cavanaugh's security standards and practices were consistent with the standards and practices employed at other bars in the State of Indiana. It could hardly be argued that Cavanaugh's is liable for this unexpected fight when the bar in *Goodwin* did not even employ any security staff to prevent the shooting. If Cavanaugh's was expected to prevent the incident, Cavanaugh's would become an insurer of its patron's safety which is contrary to public policy.

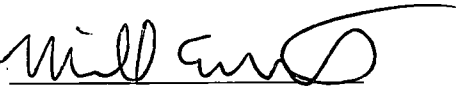
Therefore, the Court should grant the Defendant's Motion for Summary Judgment.

III. CONCLUSION

For the above reasons, this Court should grant the Defendant's Motion for Summary Judgment because there does not exist a genuine issue of material fact, so the Defendant is entitled to judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 31st day of January, 2018, service of a true and complete copy of the above foregoing pleading or paper was made upon each party or attorney of record herein by depositing same in the United States mail in envelopes properly addressed to each of them and with sufficient first-class postage affixed.

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